[Cite as *Green v. Brothers*, 2009-Ohio-5722.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
TERRY GREEN, et al.	:	Sheila G. Farmer, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 0054
	:	
	:	
RICK BROTHERS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2007 CV 00049
JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	October 26, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT E. SOLES, JR. Law Office of Robert E. Soles 6545 Market Ave., North Canton, Ohio 44721	DOUGLAS C. BOND 808 Courtyard Centre 116 Cleveland Avenue, N.W. Canton, Ohio 44702

Edwards, J.

{¶1} Appellant, Rick Brothers, appeals a judgment of the Stark County Common Pleas Court awarding appellees Terry and Kathy Green damages of $22,500.00 for breach of a real estate purchase agreement.

STATEMENT OF FACTS AND CASE

{¶2} In 2004, appellees purchased a home located at 12911 Beeson St. in Alliance, Ohio. After remodeling the home, they listed the home for sale in June, 2005, at a price of $347,000.00. When they received no offers at that price, they lowered their asking price. On June 8, 2006, they signed a purchase agreement to sell the home to appellant for $285,000.00. Appellant deposited $10,000.00 with appellees' relator, Howard Hanna.

{¶3} The purchase agreement provided that appellant was to apply for a first mortgage loan in the amount of $140,000.00 or less within five days after acceptance of his offer to purchase the property from appellees. Appellant did not seek a loan within five days, and did not appear for the scheduled closing on July 10, 2006.

{¶4} On July 12, 2006, the parties modified the agreement. Appellant agreed to give appellee an additional $10,000.00 in cash. The amount of the down payment was changed from $135,000.00 to $70,000.00 and the amount for which appellant was to seek financing was changed from $140,000.00 to $195,000.00. The closing date was set for July 24, 2006.

{¶5} Appellant applied for financing with First Place Bank on or about July 14, 2006. He did not apply for a conventional mortgage loan. Appellant claimed he applied for a loan in the amount of $195,000.00. However, the paperwork submitted to the

underwriter from First Place Bank indicated that he applied for a loan in the amount of $256,500.00.

{¶6} Appellant failed to appear for the closing scheduled for July 24, 2006, and appellees did not hear from appellant thereafter. Appellant's loan application with First Place Bank was rejected on August 9, 2006.

{¶7} Appellees re-listed the property for sale in August of 2006. They sold the property in October of 2006, for $235,000.00.

{¶8} Appellees filed the instant action in the Stark County Common Pleas Court against appellant and the Howard Hanna Company. Count one alleged a breach of contract against appellant. Count two sought a declaration that they were entitled to the $10,000.00 being held in escrow by the Howard Hanna Company and that they were entitled to keep the $10,000.00 they received from appellant on July 12, 2006. Appellant filed a cross-claim against Howard Hanna seeking a return of the $10,000.00 held in escrow, and a counterclaim against appellees seeking a return of the $10,000.00 paid to appellees on July 12, 2006.

{¶9} On March 23, 2007, by an agreed judgment entry, Howard Hanna agreed to transfer the $10,000.00 held in escrow to the trust account of Robert Soles, Jr., appellees' attorney, at which time all claims against Howard Hanna would be dismissed. Appellees accordingly dismissed their claim against Howard Hanna on April 10, 2007, and appellant dismissed his cross-claim on April 25, 2007.

{¶10} The case proceeded to bench trial on February 5, 2008. Following trial, the court found that appellant breached the original purchase agreement by failing to seek a first mortgage loan within five days, and breached the modified purchase

agreement by failing to apply for a first mortgage loan, seeking financing from only one institution, failing to cooperate with First Place Bank and failing to be candid with the seller and the lender as to his true financial status. The parties agreed that the appropriate measure of damages is the original sales price agreed on between the parties less the fair market value of the home at the time it was ultimately sold in October, 2006. The court found that the fair market value of the property was the average of the appraisals submitted by appellees ($250,000.00) and appellant ($275,000.00), or $262,500.00. The court therefore found damages in the amount of $22,500.00.

{¶11} The court further found that the interest on the $20,000.00 previously paid by appellant, whether in the possession of appellees or their attorney, totaled $2,400.00 from June, 2006 through December 31, 2007. The court therefore found that appellees had received $22,400 from appellant, and appellant owed appellees $100.00.

{¶12} Appellant assigns two errors:

{¶13} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANTS (SIC) MOTION FOR DIRECTED VERDICT AS APPELLEE FAILED TO ESTABLISH THE VALUE OF THE REAL PROPERTY ON THE DATE OF THE BREACH OF CONTRACT.

{¶14} "II. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT HAD NOT COMPLIED WITH THE CONTRACTUAL OBLIGATION TO OBTAIN FINANCING."

{¶15} Appellees assign a single error on cross-appeal:

{¶16} "THE TRIAL COURT ERRED BY AWARDING INTEREST TO APPELLANT RATHER THAN TO APPELLEES."

{¶17} We first address the assignments of error raised by appellant on direct appeal.

I

{¶18} In his first assignment of error, appellant argues that the court erred in failing to direct a verdict at the close of appellees' case. Appellant argues that Terry Green testified that the breach of contract occurred on July 12, 2006, but appellees' appraiser testified as to the value of the property on August 1, 2006. Appellant argues that appellees failed to present evidence of the value of the property on the date of the breach, relying on *Williams v. Kondziela*, Lake App. No. 2002-L-190, 2004-Ohio-2077.[1]

{¶19} As an initial matter, we note that because this case involved a bench trial, the rule governing directed verdicts is not applicable. *Lillibridge v. Tarman*, Coshocton App. No. 08CA0009, 2009-Ohio-2216, ¶49, citing *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66. In a bench trial, a defendant seeking a favorable disposition after the close of the plaintiff's case must move to dismiss under the rule governing involuntary dismissal in non-jury actions. Id.

{¶20} Civ.R. 41(B)(2), which governs involuntary dismissal, provides in relevant part as follows: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant * * * may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no

[1] While appellant now argues that appellees failed to present evidence of value on the date of the breach, the parties agreed at trial that the measure of damages was the original sale price less the value of the home on the date it was sold. However, because the trial court found that the time between June 13, 2006, and October 6, 2006, did not affect the fair market value of the property, the discrepancy between appellant's argument now and the agreement at the time of trial is immaterial to the outcome.

right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

{¶21} "In ruling upon a Civ.R. 41(B)(2) motion, it is the function of the trial court to review the evidence and the law. * * * In this respect, the trial court is not required to construe the evidence in favor of the non-moving party, but rather may weigh the evidence and render judgment. * * * Where plaintiff's evidence is insufficient to sustain plaintiff's burden in the matter, the trial court *may* dismiss the case." (Emphasis sic.) *Levine v. Beckman* (1988), 48 Ohio App.3d 24, 27, 548 N.E.2d 267. (Citations omitted).

{¶22} Appellees also argue that appellant waived any error by failing to renew his motion at the close of all evidence. Appellees argue that when a motion for a directed verdict is made by a defendant at the close of the plaintiff's case and is overruled, the defendant's right to rely on the denial of that motion as error is not waived when the defendant proceeds to present evidence as long as the motion is renewed at the conclusion of all evidence. *Williams v. City of Akron*, 107 Ohio St.3d 203, 208, 837 N.E.2d 1169, 2005-Ohio-6268. Appellees argue that the same principle applies to a motion to dismiss, citing *Branigan Packaging Co. v. Gem City Electric Supply Co.* (August 3, 1981), Montgomery App. No. 7033, unreported.

{¶23} Although appellant moved for directed verdict rather than a Civ. R. 41(B)(2) dismissal, and although appellant failed to renew his motion at the close of all evidence, we find that appellant has not demonstrated error even if he had properly preserved the error for appellate review. Appellant's reliance on *Williams*, supra, for the proposition that appellees must present evidence of the value of the property on the

specific day of the breach is misplaced. *Williams* simply holds that the measure of damages is the difference between the contract price and the fair market value of the property at the time of the breach. The case does not require that the evidence be presented as to a specific date. 2004-Ohio-2077, ¶20.

{¶24} In the instant case, appellee Terry Green did not testify that July 12 was the only date on which the contract was breached. He testified that appellant breached the original contract July 12. Tr. 116. He testified that appellant did not follow the contract from June 7, 2006. Tr. 117. He further testified that he had "complaints" about appellant's performance under the contract as modified on July 12 because appellant failed to follow that contract as well. Tr. 117. The trial court specifically found that appellant did not comply with the original contract and further did not comply with the contract as modified. Therefore, the breach did not occur on a single date, but over a period of time.

{¶25} Appellees presented evidence of the fair market value of the property pursuant to an appraisal conducted on August 1, and the resale price at which they ultimately sold the property on October 6. Appellant's appraiser testified to the fair market value during a date range from July, 2006, through October, 2006. Tr. 43. The court specifically stated, "I find the time between June 13, 2006, and October 6, 2006, to be insignificant and did not affect the fair market value of the property." Judgment Entry, February 11, 2008, page 2. This finding was supported by the testimony of the appraisals and the testimony concerning the ultimate resale price of the property. The court did not err in failing to dismiss the case for want of evidence of the fair market value on the date appellant breached the contract.

{¶26} The first assignment of error is overruled.

II

{¶27} In his second assignment of error, appellant argues the court erred in finding he had failed to comply with the contractual obligation to obtain financing. While not specifically argued as a manifest weight of the evidence claim, appellant's argument appears to be that the court's finding that he breached the contractual provision which required him to obtain financing is against the manifest weight of the evidence. Appellant argues that based on his testimony, the court should have found that appellant applied for the loan in the amount required by the financing agreement within five days of the July 12, 2006, his application was denied, and the contract was therefore null and void.

{¶28} A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by the reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. In determining whether a judgment is against the manifest weight of the evidence, we must give deference to the findings of the trial judge, who is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and to use these observations in weighting the credibility of the testimony. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶29} The financing provision of the contract provides:

{¶30} "FINANCING: This transaction is conditioned upon BUYER obtaining a commitment for a first mortgage loan (the 'Loan') from Howard Hanna Mortgage

Services or such other lending institution chosen by BUYER in the amount set forth in D(3) above, or in a lesser amount acceptable to BUYER. BUYER agrees to apply in writing for the Loan within five (5) Days, as defined in Section Q, after the date of Acceptance, to cooperate fully with the lender's request for information and to use good faith efforts to obtain the Loan. If BUYER'S loan application is neither approved nor denied within 20 days after the date of Acceptance, then BUYER may either request a written extension or remove this contingency in writing.

{¶31} "If BUYER'S loan application is denied, or if SELLER refuses an extension and BUYER does not remove this contingency, then this agreement ('AGREEMENT') shall be null and void, neither BUYER, SELLER nor any REALTOR(S)® involved in this transaction shall have any further liability or obligation to each other, and both BUYER and SELLER agree to sign a mutual release, whereupon the earnest money shall be returned to BUYER."

{¶32} Section D(3) concerning purchase price stated that the balance due on the contract was to be in the form of a conventional mortgage loan. The contract originally required appellant to apply for a loan within four days of June 13, 2006, in the amount of $140,000.00 or less. The financing provision as modified required appellant to seek financing within four days of July 12, 2006, in an amount of $195,000.00 or less.

{¶33} The evidence demonstrated that appellant made no effort to obtain financing within four days of June 13. He testified that he made no formal applications, but engaged in "fact finding." Tr. 145-146.

{¶34} After the modification was signed on July 12, appellant contacted Jim Ring at First Place Bank by telephone. He did not apply in writing at that time, but verbally

requested a signature loan rather than a conventional mortgage loan. Tr. 146. Appellant admitted that he read the financing provision of the contract in section D(3) to require him to apply for a conventional mortgage loan, and he admitted that he did not do so at that point in time. Tr. 147. He testified that he was not sure if he ever filled out a written application for a loan, but he "believed" he did. Tr. 147. However, he did not have a copy of such written application and there was no written application in his file at First Place Bank. Tr. 147. Appellant testified that he told Jim Ring that he needed financing in the amount of $195,000.00-$200,000.00. Tr. 148. However, the Uniform Residential Loan Application filled out on his behalf by the bank indicated the amount of the mortgage applied for was $265,500.00. Tr. 149.

{¶35} The evidence supported the court's finding that appellant failed to comply with the provisions of the contract regarding his duty to seek financing. The judgment is not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶36} We next address the assignment of error raised by appellees on cross-appeal:

Cross-Appeal I

{¶37} Appellees argue on cross-appeal that the court erred in giving appellant credit against the judgment for interest appellees could have earned on the $20,000.00 in their possession. The trial court found as follows:

{¶38} "Therefore, I find the fair market value of the property to be $262,500. Subtract this amount from $285,000 leaves a balance of $22,500 as and for damages. I further find that the interest paid on $20,000, whether it be in possession of the Plaintiffs

or in the possession of the Plaintiff's attorney at 8%, is $1,600 for the year of June 2006 to July 2007, and then for the six months from July 2007 to December 31, 2007 is $800, for a balance of $2,400 in interest. Therefore, the Plaintiffs have received $22,400, for a balance due and owing of $100."

{¶39} Appellees argue that they are entitled to statutory interest on the sum of $12,500.00 (total damages of $22,500.00 minus the $10,000.00 in their possession) from July 24, 2006, the date appellant failed to close on the modified contract. They argue interest should accrue on the sum of $10,000.00 held by their attorney in escrow from July 24, 2006, through February 11, 2008, the date of the trial court's judgment releasing the money from escrow to appellees. They argue interest should continue to accrue on the amount of $2,500.00 which remains unpaid, from the date of the breach.

{¶40} R.C. 1343.03 provides in pertinent part:

{¶41} "(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided

pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

{¶42} "(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied."

{¶43} R.C. 1343.03(A) requires an award of prejudgment interest to a successful party on a breach of contract claim as compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or un-liquidated and even if the sum was not capable of ascertainment until determined by the court. *Royal Electric Construction Corp. v. Ohio State University* (1995), 73 Ohio St.3d 110, 117, 652 N.E.2d 687. Lack of a good faith effort to settle is not a predicate to an award of prejudgment interest under R.C. 1343.03(A) as it is under R.C. 1343.03(C). *Landis v. Grange Mutual Ins. Co.,* 82 Ohio St. 3d 339, 341, 695 N.E. 2d 1140, 1142, 1998-Ohio-387.

{¶44} In the instant case, the amount became due and payable on the date of the second closing, July 24, 2006. Appellees were entitled to prejudgment interest on

the damage amount from that day through February 11, 2008, the date the court's judgment was issued. They were entitled to post-judgment interest on the unpaid portion of the judgment from February 11, 2008, until the claim is satisfied.

{¶45} Appellees concede that they had in their possession $10,000.00 of appellant's money before the date of the breach. The trial court erred in giving credit to appellant against the judgment for interest accrued on that money because appellees were entitled to prejudgment interest on that portion of the judgment, and any interest they accrued by virtue of having that money in their possession was money they were entitled to receive pursuant to the statute. Appellant therefore should not be given additional credit against the judgment for such interest, which he would have been entitled to pay as a part of the damage award had the money not been in appellees' possession.

{¶46} Therefore, we agree with appellees that the amount on which the court should have calculated interest is $12,500.00, representing the damage award of $22,500.00 less the $10,000.00 in appellees' possession.

{¶47} We also agree with appellees that the court erred in crediting appellant with interest for the $10,000.00 in the possession of their attorney during the pendency of the case. For the reasons stated above, appellees are entitled to prejudgment interest on this money, and any interest which accrued to their benefit was money they were entitled to under the statute. The court erred in giving appellant credit against the judgment for interest earned on this amount.

{¶48} Further, the March 23, 2007, judgment of the court reflects that the money was escrowed in the trust account of appellees' attorney, to be held by him in trust until

final settlement or judgment of the lawsuit. The interest from such an account does not earn interest for the client, but rather for the benefit of the Ohio Legal Assistance Foundation. Ohio Prof. Cond. Rule 1.15(h). Therefore, appellees were entitled to receive interest from appellant on this portion of the judgment from July 24, 2006, through February 11, 2008, the date on which the money was released to appellees from the trust account. They did not in fact have the opportunity to receive interest because the money was not in their possession, and they should now be awarded interest on this $10,000.00 as part of their damage award.

{¶49} A balance of $2,500.00 remains unsatisfied from the $22,500.00 damage award. Appellees are entitled to prejudgment interest on this amount from July 24, 2006, to February 11, 2008, and to post-judgment interest from February 11, 2008, until the award is satisfied.

{¶50} The assignment of error on cross-appeal is sustained. This matter is reversed as to the court's finding that all but $100.00 of the judgment has been satisfied. The judgment is affirmed in all other respects. This cause is remanded to the trial court for a determination of the unpaid amount of the judgment, including a calculation of prejudgment interest on $12,500.00 and post-judgment interest on $2,500.00, consistent with this opinion.

By: Edwards, J.

Farmer, P.J. and

Hoffman, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/William G. Hoffman

JUDGES

JAE/r1013

[Cite as *Green v. Brothers*, 2009-Ohio-5722.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TERRY GREEN, et al.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RICK BROTHERS	:	
Defendant-Appellant	:	CASE NO. 2008 CA 0054

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part, and reversed and remanded in part. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/William B. Hoffman

JUDGES